Oral Argument Not Yet Scheduled

No. 16-3076

No. 16-3570

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOVELIS CORPORATION, Petitioner/Cross-Respondent,

JOHN TESORIERO, MICHAEL MALONE,
RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors,
v.

NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNAIONAL UNION, AFL-CIO, CLC, Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

Richard J. Brean
Daniel M. Kovalik
Anthony P. Resnick
United Steelworkers Legal Department
60 Boulevard of the Allies, Room 807
Pittsburgh, PA 15222-1214
Telephone: 412-562-2530
Facsimile: 412-562-2574
rbrean@usw.org
dkovalik@usw.org
aresnick@usw.org

Brian J. LaClair
Kenneth L. Wagner
Blitman & King, LLP
Franklin Center, Suite 300
443 North Franklin Street
Syracuse NY 13201
Telephone:315-671-3262
Facsimile: 315-471-2623
bjlaclair@bklawyers.com
klwagner@bklawyers.com

Counsel for Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. STATEMENT OF JURISDICTION

Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, "USW", agrees with the Statement of Jurisdiction contained in the brief of the National Labor Relations Board, "The Board" or "The NLRB".

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Board abused its discretion in its Decision and Order,[1] reported at 364 NLRB No. 101 (August 26, 2016), when it ordered Novelis Corporation, "Novelis", to recognize and bargain with USW pursuant to *NLRB v. Gissel Packaging Co*., 395 U.S. 575 (1969).

III. STATEMENT OF THE CASE

In its D&O, the Board found that Novelis committed sixteen unfair labor practices, overturned a February 20, 2014, election that USW had lost 273-287, concluded that a Category II bargaining order was warranted under the holding of *Gissel,* 395 U.S. 575 at 610, and ordered Novelis to recognize and bargain with USW in a bargaining unit of specified employees at its plant in Oswego, New York. [A.1696-1701]. In this consolidated proceeding, Novelis has filed a petition for review seeking to overturn both the substantive violations found by the Board

[1] A Deferred Appendix is being utilized in these consolidated cases. "D&O" refers to the Board's Decision and Order. "Tr." refers to the Hearing Transcript.

and the *Gissel* bargaining order, and the NLRB has filed an application to enforce the D&O.[A.1744-1747, A.1748-1750]. USW, which has intervened on the side of the Board, adopts in its entirety the Board's briefing in support of enforcement of the D&O, and in addition offers this further briefing supporting the argument that the Board did not abuse its discretion in entering the bargaining order at issue here.

A) The Sixteen Unfair Labor Practices Found By the Board

USW filed its election petition on January 9, 2014, and the election was held on February 20.[2] [A.1696]. During this six week period, the Board found that Novelis committed no fewer than fifteen separate unfair labor practices violating Section 8(a)(1) of the National Labor Relations Act.[3] The first occurred on the very same day that USW filed its petition, when Novelis "granted a substantial benefit to employees by restoring Sunday premium pay and unscheduled overtime pay to forestall the momentum of the organizing campaign." [A.1698,A.1701, A.1729]. It committed a second ULP by "removing union literature from mixed use areas" by the conduct of Supervisors Jason Bro on January 12, January 21, and January 23, Duane Gordon on January 21, Dan Taylor on January 23, and Thomas Granbois on January 23. [A.1701, A.1718-1719, A.1732-1734]. A third ULP of

[2] Unless otherwise indicated, all dates referenced in this brief occur in 2014.

[3] 29 U.S.C. §158(a)(1).

"selectively and disparately enforcing the Respondent's posting and distribution rules, by prohibiting union postings and distributions while permitting non-union and anti-union postings and distributions" was established by the conduct of the same individuals on the same dates set out in the preceding sentence. (A. 1701, A.1718-1719, A. 1732-1734].

On January 23, Bro committed Novelis' fourth and fifth ULPs by "threatening employees by telling them they did not have to work for the Respondent if they are unhappy with their terms and conditions of employment", and "prohibiting employees from wearing union insignia on their uniforms while permitting employees to wear anti-union and other insignia". [A.1701, A.1719-1720, A.1733].

On January 23 and again on January 30, Novelis' sixth ULP was proven when Bro "interrogat[ed] employees about their union membership, activities, and sympathies". [A.1701, A.1718-1719, A1732-1733]. On January 28, Supervisor Craig Formoza committed Novelis' seventh ULP by "threatening an employee with layoff if employees selected the Union as their bargaining representative". [A. 1701, A. 1720, A. 1733]. Novelis' eighth ULP occurred on February 11when Human Resources Leader Andrew Quinn approached a group of employees "soliciting grievances and promising to remedy them in order to discourage employees from selecting union representation". [A.1701, A. 1720, A.1733].

The ninth and tenth ULPs spanned the entire length of the six week pre-election period and continued thereafter and were caused by Novelis' conduct of "maintaining and giving effect to its overly broad unlawful social media policy" and "maintaining an overly broad work rule that unlawfully interferes with employees' use of Respondent's e-mail system for Section 7 purposes." [A. 1701, A.1707-1708, A. 1733-1734].

Five more ULPs were committed a few days before the February 20 election when at three captive audience meetings held on February 17 and February 18 Novelis President and Chief Executive Officer Phil Martens and Oswego plant manager Chris Smith made speeches "threatening employees with job loss if they select the Union as their bargaining representative", "threatening employees with more onerous working conditions if they select the Union as their bargaining representative", "threatening employees with a reduction in wages if they select the Union as their bargaining representative", "threatening employees that the Respondent would lose business if they select the Union as their bargaining representative", and "misrepresenting that the Union is seeking to have the Respondent rescind employees' pay and/or benefits and blaming the Union by telling employees that they would have to pay back wages retroactively as a result of unfair labor practices charges filed by the Union". [A. 1699-1701, A1721-1726, A.1738-1740].

Novelis' sixteenth and final ULP occurred subsequent to the election on April 4, when it violated §§ 8(a)(1) and (3)[4] by demoting Union activist "Everett Abare because of his support for the Union or engaging in other protected concerted activities". [A. 1699, A. 1701, A. 1726 -1728, A. 1735-1737].

B) Overview Of The Board's Analysis Supporting the Entry Of A *Gissel* Bargaining Order

In recommending that the Board issue a *Gissel* bargaining order, the ALJ did not specify whether he regarded the case as falling within *Gissel* Category I or Category II. [A. 1698]. However, given the content of his opinion, the Board assumed that he regarded Novelis' conduct as falling within Category II, and it agreed with the ALJ's characterization. *Id.*

The Board began its analysis by quoting the Supreme Court's distinction between Category I cases, which are "marked by 'outrageous' and 'pervasive' unfair labor practices" and Category II cases, which involve "…less pervasive [unfair labor] practices which nonetheless still have a tendency to undermine majority strength and impede the election process". [A. 1698 at 4 quoting *Gissel*, 395 U.S. at 613,614]. It then quoted the Supreme Court's required finding that the Board must make to issue a Category II bargaining order: '"that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair

[4] 29 U.S.C. §§158(a) (1) and (3).

election…by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. *id.* at 614-615"'. [A. 1698].

Next, the Board, quoting *Hogan Transports, Inc.*, 363 NLRB No. 96, slip op. at 6 (May 19, 2016) and *Cast-Matic Corp.*, 350 NLRB 1349 at 1359 (2007), identified the factors relevant to determining the appropriateness of a Category II bargaining order under the long established NLRB standard: '"… seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations , the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices.'" [A. 1698]. It then applied this test to identify three "particularly serious violations that are likely to remain in the employees' minds and make it extremely unlikely that a fair re-run election could ever be held": the restoration of Sunday premium pay and unscheduled overtime pay on January 9, whose elimination had been the sole catalyst for the employees' seeking union representation, the threats of job loss made by Martens and Smith at the February 17-18 captive audience meetings, and the post-election April 4 demotion of Everett Abare "the leader of the organizing effort and a well-known union adherent of the Respondent… because of his protected social media posting reflecting continuing support of the Union and discontent with existing

conditions of employment". [A. 1698-1699]. Drawing upon on-point Supreme Court and NLRB precedent, the Board explained why each of the three unfair labor practices was likely to linger in employees' memory and interfere with the possibility of a fair election, despite employment of the Board's traditional remedies. [A. 1698-1700]. The Board also found, again based on long-standing NLRB case law, that the imposition of a bargaining order was further supported by the unit-wide maintenance of an unlawful social media policy and the threats made at the captive audience meetings by Martens and Smith "of loss of business, reduced pay, and more onerous working conditions", and statements made at the same meetings misrepresenting that USW was seeking to rescind the restoration of the Sunday premium pay and unscheduled overtime pay. [A. 1699].

In an extended footnote at the end of its decision, the Board took up Novelis' three motions to reopen the record to consider post-election events. [A. 1700, n.17]. After denying the motions based on settled NLRB law that "the Board does not consider turnover among bargaining unit employees or management officials and the passage of time in determining whether a *Gissel* order is appropriate", it nevertheless considered the proffered facts and explained why it concluded that "Even if we were to consider the Respondent's evidence, it would not require a different result." *Id.*

IV. SUMMARY OF THE ARGUMENT

USW's argument consists of six distinct parts set forth in Parts VI (A-E) of our Brief. First, after setting out the controlling Second Circuit law in Parts A and B(1), we explain that the ULPs relied on by the Board to justify the *Gissel* II bargaining order here are more than sufficient because they are more serious than those in *NLRB v. International Metal Specialties*, 443 F.2d 870 (2d Cir., 1970), cert. den. 402 U.S. 907 (1971), where this Court enforced a bargaining order on the ground that this result was required by *Gissel* itself, which reasoning was explicitly endorsed in *NLRB v. General Stencils*, 438 F.2d 894 at 902-903 (2d Cir., 1971). *Supra* at 11-18.

Second, in Part B(2), drawing on the relevant portions of the Second Circuit test set out in *Jamaica Towing v. NLRB*, 632 F.2d 207 at 212-214 (2d Cir., 1980), we discuss at length the portion of the D&O devoted to examining the seriousness, extent, and inhibitive impact of Novelis' ULPs and explain why, before possibly mitigating evidence is considered, the Board did not abuse its discretion in concluding these ULPs rendered traditional Board remedies inadequate to insure more than a "slight possibility" of a fair re-run election. *Supra* at 19-31.

Third, we take up in Part VI(C)(1) the Board's consideration of two required types of such possibly mitigating evidence, employee turnover and passage of time, and show that the Board considered both factors as required by *NLRB v. Knogo Corp.*, 727 F.2d 55 at 60 (2d Cir., 1984), and *NLRB v. Windsor Industries*,

Inc., 730 F.2d 860 at 864 (2d Cir., 1984). We then explain that in the circumstances here, where the ULPs were serious and wide-spread, both are irrelevant under *NLRB v. W.A.D. Rentals, Ltd.*, 919 F.2d 839 at 841-852 (2d. Cir., 1990), which arises in a related bargaining order context and is consistent with both *Gissel*, 395 U.S. at 611, and *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120 at 1132 (5th Cir., 1980), a *Gissel* II case. *Supra* at 32-43.

Fourth, relying on *Gissel*, and *NLRB v. Scoler's, Inc.*, 466 F.2d 1289 (2d Cir., 1972), we prove in Part VI(C)(2) that the Board did not abuse its discretion in concluding that Novelis' evidence as to management turnover and lack of recurrence of ULPs does not alter the necessity of a *Gissel* II bargaining order. This is because, in the circumstances here, where Novelis' ULPs left only a "slight possibility" of a fair re-run election, the issue of the likely recurrence of ULPs is not a required part of the Board's case in chief. Consequently, its consideration is consigned to the discretion of the Board, rendering irrelevant the issue of management turnover. *Supra* at 43-46.

Fifth, based on *Seeler v. Trading Port, Inc.*, 517 F.2d 33 at 37-82 (2d Cir., 1975), we demonstrate in part VI(D) that the §10(j) order issued here, which denied the Regional Director's request for a bargaining order, far from eliminating the need for a *Gissel* II order, as claimed by Novelis, is actually proof of its continued necessity. *Supra* at 46-49.

Sixth, and finally, in part VI(E), we rely on the Fifth Circuit's on-point decision in *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514 at 525-527 (5th Cir., 1971), to rebut Novelis' argument that the Board abused its discretion by refusing to admit testimony concerning individual employees' beliefs and opinions as to the subjective effect of Novelis' ULPs on employees and the reasons why USW lost the election. *Supra* at 50-52.

V. APPLICABLE STANDARD OF REVIEW

In *Gissel*, the Supreme Court made clear that the "determination" as to whether employment of the Board's traditional remedies of a cease and desist order and accompanying notice suffice to permit a fair re-run election or whether a bargaining order is necessary. ". . . is for the Board and not the courts . . .based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." *Gissel*, 395 U.S. at 612, n. 32. The Court further emphasized that "the Board draws on a fund of knowledge and expertise all of its own, and its choice of remedy must therefore be given special respect by reviewing courts" and that "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency". *Id.* (citations omitted). Consistent with this mandate from the Supreme Court, the Second Circuit "reviews the issuance of a bargaining order for an abuse of discretion." *HarperCollins San*

Francisco v. NLRB, 79 F.3d 1324 at 1331 (2d Cir., 1996), citing *Kinney Drugs, Inc. v. NLRB,* 74 F.3d 1419 at 1428 (2d Cir., 1996).

VI. ARGUMENT

A) The Second Circuit Standard For Enforcing A Category II *Gissel* Bargaining Order

The Second Circuit, adopting the Supreme Court's framework, distinguishes between Category I and Category II *Gissel* orders in deciding whether the Board has abused its discretion in ordering their issuance. With respect to the former, "extensive analysis of other factors is not required" since the Board's finding that the ULPs were committed is sufficient to justify a *Gissel* I bargaining order because the ULPs, by their very nature, "render a fair election impossible." *Kaynard v. MMIC, Inc.*, 734 F.2d 950 at 954 (2d Cir., 1984, citations omitted). With respect to the latter, the Second Circuit test, tracking that of the Supreme Court, requires that the Board not merely consider "the extensiveness of the employer's unfair labor practices" but also decide whether the Board's traditional remedies of a cease and desist order and accompanying notice have only a "slight possibility" of "erasing the effect of past [unfair labor] practices and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order… *Id.* at 614-615.'" *Jamaica Towing,* 632 F.2d at 212. As interpreted by the Second Circuit, this obligation placed on the Board by the Supreme Court compels the Board, in exercising its remedial discretion to:

> ". . . analyze the nature of the misconduct and the surrounding and succeeding events in each case in an effort to assess the potential for a free and uncoerced election under current conditions. …*Id.* The issuance of a bargaining order is proper only if, after reviewing all relevant circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, the board may reasonably conclude that the employees will be unable to exercise a free choice in an election . . ." *NLRB v. J. Coty Messenger Service*, 763 F.2d 92 at 100 (2d Cir., 1985, c*itations omitted).*

In practice, this standard imposes two distinct burdens on the Board. First, in analyzing "the nature of the employer's misbehavior", the Board must examine the employer's ULPs and "determine the seriousness, extent, and longevity of any inhibitive impact", and conclude that there is only a "slight possibility" that the Board's traditional remedies of a cease and desist order and notice posting could "eras[e] the effects of past [unfair labor] practices so as to "ensur[e] a fair election or re-run." *Jamaica Towing*, 632 F.2d at 212-214. Second, the Board must also examine "any later events bearing on the impact [of the employer's ULPs] on the employees" and issue a bargaining order only if it "reasonably concludes" that employees were still '"unable to exercise a free choice in an election'". *J. Coty Messenger Service*, 763 F.2d at 100 (citation omitted). Among the "subsequent events bearing upon employee choice" that the Board is required to consider are "changes in the management as well as in the workforce and the passage of time." *Jamaica Towing*, at 214.

In addition to these two substantive requirements for review, this Court also imposes procedural requirements as to the specificity of the Board's explanation of its choice of a bargaining order. Thus, in *HarperCollins San Francisco v. NLRB*, 79 F.3d at 1332 (citation omitted), the Circuit emphasized that "the mere recitation of unfair labor practices, accompanied by a conclusory statement that the possibility of conducting a fair rerun election by use of traditional remedies is slight, does not satisfy the NLRB's responsibility to analyze the attending circumstances". And, in addition, it insisted that "The NLRB may not . . . totally disregard circumstances subsequent to the ULPs that weigh against the imposition of a bargaining order" *Id.* (citation omitted).

B) The Board Did Not Abuse Its Discretion In Finding That The Seriousness And Extent Of Novelis' ULPs As Well As The Longevity Of Their Impact Renders Traditional Board Remedies Inadequate To Insure More Than A "Slight Possibility" Of A Fair Re-run Election

1) Additional Relevant Second Circuit Law

In the immediate wake of *Gissel*, this Court issued a number of decisions in 1970 enforcing Category II *Gissel* bargaining orders. See e.g. *NLRB v. International Metal Specialties*, 433 F.2d 870 (2d Cir., 1970), cert. den. 402 U.S. 907 (1971); *Byrne Dairy, Inc. v. NLRB*, 431 F.2d 1363 (2d Cir., 1970); *NLRB v. Marsellus Vault & Sales, Inc.*,431 F.2d 933 (2d Cir., 1970) . Subsequently in *NLRB v. General Stencils*, 438 F.2d 894 at 902-903 (2d Cir., 1971), the threshold

issue was whether the proven ULPs of the interrogation of a single employee, the fact of which had not been disseminated, and threats to several employees to withdraw minor benefits were sufficient to support a Category II bargaining order. In finding that they were not, this Court surveyed the Second Circuit law and cited these three cases as containing clusters of ULPs that warranted such an order, listing the violations in detail: *Marsellus Vault*, "(general threats of plant closure, promises of benefits, and persuasion to form separate union)", *Byrne Dairy*, "(threat of plant closure and loss of benefits made to all employees)", and *International Metal Specialties* "(threats of plant closure and loss of benefits, unilateral wage increases, and persuasion to form grievance committee thus by – passing the union"). *Id.* at 903.

None of the these decisions contains a detailed explanation as to why this Court deemed the employers' violations sufficient to sustain a *Gissel* II bargaining order, but one of the cases, *International Metal Specialties,* remains highly instructive because it explicitly acknowledged that enforcement was compelled by *Gissel* itself. 433 F.2d at 872-873. There, the ULPs relied on by the Board to support the Category II *Gissel* order included two "hallmark" violations[5] of threats to close the plant by two supervisors and the granting of wage increases to deter

[5] "Hallmark" violations are unfair labor practices that "have been regularly regarded by the Courts as highly coercive". *Jamaica Towing*, 632 F.2d at 212.

unionization, as well as two non-hallmark violations of threatening loss of benefits and urging employees to form a committee to deal directly with the employer to remedy their grievances. *Id.* at 871. Notwithstanding its own doubts as to the adequacy of this showing, this Court enforced, holding that this result was required by *Gissel*:

> "Indeed, the violations in this case, marginal though they may appear to some, considerably exceeded the violations in *Sinclair Co. v. N.L.R.B.*, 395 U.S. 575, one of the cases decided in the Gissel decision, [6] yet the Court in the case affirmed the Board's use of a bargaining order. Enforcement of the Board's order is granted." *Id.* at 873.

Beginning with *General Stencils*, this Court's application of *Gissel* has evolved since *International Metal Specialties* issued, particularly as to the relevance of events subsequent to the election. However, given that *International Metal Specialties* contains the Circuit's contemporaneous interpretation of the requirements of *Gissel* and was endorsed as sound by *General Stencils*, it is still good law as to the base-line showing of ULPs sufficient to support a Category II bargaining order before any after-occurring mitigating factors are considered. And

[6] In *Gissel*, the Supreme Court affirmed *Sinclair Company v. NLRB*, 397 F.2d 157 (1st Cir., 1968), a case enforcing a Board decision in which the unfair labor practices supporting the bargaining order were a series of employer communications which considered together "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production with the resulting loss of jobs to the wire weavers." 395 U.S. at 589.

International Metal Specialties' recognition of the central importance of hallmark violations is later reflected in this Court's much cited 1980 decision in *Jamaica Towing*, which is apposite here.

The core insight of *Jamaica Towing* is that the presence of one or more "hallmark" violations is generally[7] a necessary but not sufficient precondition for an enforceable Gis*sel* Category II order.[8] The decision, which is based on a broad range of Court of Appeals and Board precedent, [9] identified the three such hallmark violations most likely to support the issuance of a *Gissel* II bargaining order: "the closing of a plant or threats of plant closure or loss of employment, the

---

[7] A *Gissel* II bargaining order is also warranted "if there is an array of less serious violations which [are] either . . . numerous or . . . coupled with some other factor intensifying their effect. . ." *Jamaica Towing* 632 F.2d at 213. Included in these "less serious" ULPs are interrogations, promises of benefits, and threats of decreased benefits. *Id*

[8] *Jamaica Towing* took this general proposition one step further in its statement that the "presence of 'hallmark' violations will support the issuance of a bargaining order unless some significant mitigating circumstance exists". 632 F.2d at 211. Subsequently, in *NLRB v. Windsor Industries, Inc.*, 730 F.2d at 865, n. 3, 866, the Second Circuit characterized this statement as dictum, because none of the proven ULPs amounted to a hallmark violation, and emphasized that since the issuance of *Jamaica Towing* it had "held that even a hallmark unfair labor practice would not 'automatically preclude a fair second election or mandate the issuance of bargaining order', quoting *J. J. Newberry Co. v. NLRB*, 645 F.2d 148 at 153 (2d Cir. 1981). The Court then went on to discuss additional cases where it had refused to enforce Category II bargaining orders, notwithstanding the presence of one or more hallmark violations, where the Board had failed to consider mitigating factors, particularly the passage of time and employee turnover. *Id*.

[9] See: *Jamaica Towing*, 632 F.2d at 212-213, nn.2-4.

grant of benefits to employees, or the reassignment, demotion, or discharge of union adherents in violation of § 8(a)(3) of the Act." *Jamaica Towing*, 632 F.2d at 213. It then went on to explain why the common characteristics of each of these ULPs fulfilled the Second Circuit's requirements as to lasting inhibitive impact on employees and the rendering of traditional Board remedies ineffective in securing more than a "slight possibility" of a fair re-run election:

> "In such cases the seriousness of the conduct, coupled with the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force.
>
> . . .
>
> They are complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period. The prospect of unionization is not a sure safeguard against such tactics." *Id.* at 213.

The Circuit then took up in turn each of the three ULPs. It began by explaining, citing Circuit Court and Board precedent, that the "reassignment, demotion, or discharge of union activists, will carry a message which cannot be lost on employees in voting groups." [10] *Jamaica Towing*, 632 F.2d. at 213. (citation

[10] A caveat included in *Jamaica Towing*, 632 F.2d at 213, that "there is some slight chance that a single 8(a)(3) violation will not be perceived as employer retribution" is inapplicable here, where the demoted USW adherent, Everett Abare, was the person widely known as being responsible for starting the drive for unionization. [A. 1699].

omitted) And it concluded that "the coercive effect of the discrimination is unlikely ever to the undone" because of unavoidable delays of "months and years" in securing reinstatement and a back pay remedy. *Id.* Next, the Court discussed the lasting coercive effect of the ULP of the granting of benefits on employee free choice because it "remed[ies] the very grievances which give rise to the union interest". *Id.* at 213, quoting *Texaco, Inc. v. NLRB*, 436 F.2d 520 at 525 (7th Cir., 1970). Finally, it addressed the threat of plant closure, which while not a completed action, still remains highly coercive because '"it is the one remaining threat of economic disadvantage which is wholly beyond the influence or the union or the control of the employees."' *Id.* at 213, (citation omitted).

The Court ended its discussion by cautioning that the "even with respect to these 'hallmark' violations, a bargaining order may be denied for a lack of pervasiveness", giving as examples a discharge whose occurrence is unknown to most employees or a discharge of a person not known to be a union supporter. *Jamaica Towing*, 632 F.2d at 212.

2) The Board Considered The Seriousness, Extent, And Inhibitive Impact Of Novelis' ULPs Consistent With The Second Circuit Test And Adequately Explained Why There Is Only A "Slight Possibility" That Traditional Board Remedies Suffice To Insure A Fair Re-run Election

The Board rested its imposition of a *Gissel* II bargaining order principally on six unfair labor practices.[11] [A. 1698-1699]. Three are hallmark violations: the restoration of Sunday premium pay and unscheduled overtime pay on January 9, the threats of job loss at the February 17-18 captive audience meetings, and the post-election April 4 demotion of Abare. [A. 1698-1702]. The remaining three ULPs fall short of hallmark status: the unit -wide maintenance of an unlawful social media policy, the threats made at the captive audience meetings "of loss of business, reduced pay, and more onerous working conditions", and the misleading statements made at the same meetings claiming that USW wanted to rescind the reinstatement of the Sunday premium and unscheduled overtime pay and blaming the union for loss of the restored benefits. *Id.*

Under the Second Circuit test, the Board must examine the cumulative impact of these six unfair labor practices to "determine the seriousness, extent, and longevity of any inhibitive impact" on employees and conclude that there was only a "slight possibility" the Board's traditional remedies could erase the effects of the

[11] In addition to these six ULPs, the Board further stated that "we rely upon the cumulative coercive impact of the Respondent's other unfair labor practices, which are both numerous and serious." [A.1699].

ULPs so as to "ensure a fair re-run election". *Jamaica Towing*, 632 F.2d at 212-214. In determining whether the Board fulfilled these requirements, our task is made simpler by the realization that the ULPs here are more serious than those in *International Metal Specialties*, 433 F.2d at 870,[12] meaning that we have already proven that Novelis' ULPs, if adequately analyzed by the Board under the Second Circuit standard, are sufficient to warrant a Category II bargaining order. With this introduction, we now apply the Second Circuit test to the Board's *Gissel* analysis.

The Board began by setting out its long established test, which is wholly consistent with that in *Jamaica Towing*, 632 F.2d at 212-214, listing the elements it considers in deciding whether ULPs warrant a Category II bargaining order '"[t]he seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices."'[A. 1698][13]

---

[12] Both *International Metal Specialties* and the case at bar contain the same two hallmark violations of threats of job loss and provision of a wage increase to deter unionization, but Novelis also committed a third extremely serious hallmark violation, the discriminatory demotion of a key union supporter. (*Supra* at 5, 6-7). In addition, Novelis' non-hallmark violations included coercive threats made at the captive audience meetings of "loss of business, reduced pay, and more onerous working conditions". [A. 1699]. By contrast, the non-hallmark ULP of bypassing in *International Metal Specialties* lacks this important element of coercion.

[13] Although the Board drew this quote from *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 6 (May 19, 2016), which itself quoted *Cast-Matic Corp.*, 350

The Board then applied this test to the Novelis facts by relying on clear and consistent NLRB case law that reflected "the Board draw[ing] on a fund of knowledge and expertise all its own." *Gissel*, 395 U.S. at 612, n.32.

The Board began its analysis by identifying "three particularly serious violations [committed by Novelis] that are likely to remain in the employees' minds and make it extremely unlikely that a fair re-run election could ever be held": the January 9 restoration of Sunday premium pay and unscheduled overtime pay, the February 17-18 threats of job loss made at captive audience meetings, and the April 4 discriminatory demotion of Abare. [A. 1698-1699]. Crucially, the Second Circuit in *Jamaica Towing* cited as the ULPs most likely to support the issuance of a *Gissel* II bargaining order the three very same violations: ". . . threats of … loss of employment, the grant of benefits to employees, or the demotions. . . of union activists in violation of §8(a)(3) of the Act." *Jamaica Towing*, 632 F.2d at 213.

With respect to the restoration of the Sunday premium pay and unscheduled overtime pay, which impacted the entire bargaining unit, the Board ruled that they were "tantamount to a pay raise". [A. 1698]. Quoting enforced NLRB cases, the

---

NLRB 1349 at 1319 (2007), the test traces back to two older, well known cases, both of which were enforced, *Garvey Marine, Inc.*, 328 NLRB 991 at 993 (1999), enf'd. 245 F.3d 819 (D.C. Cir., 2001), and *Holly Farms Corp.*, 311 NLRB 273 at 281 (1993), enf'd. 48 F.3d 1360 (4th Cir., 1995), cert. den. rel. part. 516 U.S. 963 (1995).

Board explained that the reasons "wage increases have long been held to be a substantial indication that a bargaining order is warranted" is that they have:

> '" a particularly long lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees.' *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enf'd. 531 F.3d 321 (4th Cir., 2008), quoting *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996) enf'd. 137 F.3d 936 (7th Cir., 1998).'" *Id.*[14]

This fact, the Board further explained, relying on an enforced NLRB case which itself relied on the Supreme Court's *Exchange Parts* decision, means that these increased wages will regularly appear in the employees' paychecks, serving as a continuous reminder that '"the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged'. *Holly Farms Corp.*, 311 NLRB at 282, enf'd. 48 F.3d 1360 (4th Cir., 1995) (quoting *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964)". [A.1698]. And, quoting another enforced Board decision, it explained that when an employer has granted a wage increase after the start of an organizing campaign '". . . [I]t is

[14] The Board further supported its position by citing *Pembrook Management*, 296 NLRB 1226 at 1228 (1980), which "discuss[es] cases in which the bargaining orders were issued based solely on the grant of wage increases". [A. 1698]. The two cases discussed in *Pembrook* were both enforced. See: *Honolulu Sporting Goods Co.*, 239 NLRB 1277 at 1282 (1979), enf'd 620 F.2d 310 (9th Cir., 1980), and *Tower Records*, 182 NLRB 1277 at 1282 (1970), enf'd. 1972 WL 3016 (9th Cir., 1972).

difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand, union representation might no longer be needed. *Pembrook Management*, 296 NLRB at 1228 (1980) (quoting *Tower Records*, 182 NLRB 382,387 (1970), enfd. 1972 WL 3016 (9th Cir. 1972))"' *Id.*

In *Jamaica Towing*, this Court made the identical point, emphasizing that the extraordinarily coercive power of this ULP is that it "remed[es] the very grievances which give rise to the Union interest." 632 F.2d at 213 (citation omitted). Crucially, the Board found that the impact of this particular ULP was particularly powerful here:

> ". . . where the Respondent's announced elimination of Sunday premium pay and reduction in unscheduled overtime was the flashpoint for employees seeking collective bargaining representation. Thus, once the Respondent restored these benefits, it is likely that many employees no longer saw a need for such representation." [A. 1698][15]

[15] The Board further found "that Novelis compounded the lasting coercive effect of this violation" when Martens displayed a redacted letter from the NLRB's regional office that he, along with Smith, falsely stated contained ULP charges filed by USW related to the restoration of Sunday premium and unscheduled overtime pay and then falsely claimed that if Novelis were '"found guilty"' it would have '"to rescind the newly restored benefit" [A. 1698]. In so doing, the Board further found Novelis sought to "undermine support for USW with the employees by blaming it for the potential loss of the very benefits that they had looked to the Union to restore and protect." *Id.* By this conduct, the Board concluded, citing *Hogan Transports, Inc.* 363 NLRB No. 196, slip op. at 2-3, Novelis "accentuated" the coercive effects of its other serious ULPs "by blaming the union for attempting to take away an unlawful wage increase." [A. 1698-1699].

Novelis' second hallmark violation involved the threats of job loss made by Novelis President and CEO Phil Martens and Plant Manager Chris Smith at captive audience meetings held on February 17 at 5:30 PM and on February 18 at 5:30 AM and 5:30 PM [A.1699].[16] After reviewing the statements by Martens and Smith at issue, [17] the Board found that "Martens' implicit threat of job loss, coupled with Smith's threat, lacking any objective basis, that unionization would impair the Respondent's ability to perform its contractual obligations and would cause the Respondent to lose current and future contracts at the Oswego plant sent the clear message to employees that their job security would be jeopardized if they selected the union." (*id.*). It then cited black letter Board law holding that "... [b]ecause threats of plant closure and other types of job loss are among the most flagrant of unfair labor practices, they are likely to persist in the employees' minds for longer periods of time than other unlawful conduct, and are particularly likely to destroy the chances of a fair re-run election. "See *Cardinal Home Products. Inc.*, 338 NLRB 1004, 1011 (2003); *Evergreen America Corp.*, 348 NLRB at 180." *Id.*

[16] If the attendance figures asserted by the Company are credited, "the meetings were attended by at least 250-300 employees". [A. 1698, n. 16]. On its part, the Board concluded, "we have no difficulty finding that unlawful threats made to this number of employees are pervasive, even in a bargaining unit of nearly 600 employees." *Id.*

[17] The comments are set forth in full in the ALJD. [A. 1720 – 1725].

The Second Circuit's understanding is identical, as set out in *Jamaica Towing*, 632 F.2d at 216.

With respect to the third hallmark violation, the demotion of USW supporter Abare "because of his protected social media posting reflecting continuing support of the Union and discontent with the existing conditions of employment", the Board explicitly cited *Jamaica Towing* as the sole precedent supporting its finding that the demotion was "another violation that is particularly likely to destroy the chances of a fair re-run election." [A. 1699]. It further noted that even though the unit was a large one the ALJ had found "that Abare's demotion was widely known among the employees".[18] *Id.* Consequently, the Board found that the demotion is "likely to have a lasting effect on a large percentage of Novelis' employees and to remain in employees' minds for long time". *Id.* And of great importance, the Board emphasized, quoting enforced Board precedent, the fact that Novelis took unlawful action against a union supporter "even after the election is strong evidence that its unlawful conduct will persist in the event of another organizing campaign. See: *M. J. Metal Products,* 328 NLRB 1184, 1185 (1999) (quoting

[18] Novelis quarrels with this finding of the ALJ, but it is undisputed that as a result of Smith's reading of the Board's notice pursuant to the §10(j) order, every employee hired by the date of the reading, both those present at the time of the demotion and those hired afterward, was aware of the demotion. *Supra* at 47.

Garney Morris, Inc., 313 NLRB 101, 103 (1993), enfd. 47 F.d 1161 (3d. Cir. 1995))." *Id.*

In addition to the "particularly likely serious effect" of the three hallmark violations, the Board further "rel[ied] upon the coercive impact of the Respondent's other unfair labor practices, which are both numerous and serious to support its *Gissel* II order." {A. 1699]. It identified two such ULPs as being of particular importance, the maintenance of the unlawfully overbroad social media rule and the captive audience meeting threats made by Martens and Smith "of loss of business, reduced pay, and more onerous working conditions". *Id.* These threats, the Board pointed out, because they were made by the highest ranking corporate and plant level Novelis officials were of particular salience since "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them. *Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002), enfd. 85 Fed. Appx. 614 (9th Cir. 2004)." *Id.*

Jamaica Towing, 632 F.2d at 212- 214, contemplates that in determining whether only a "slight possibility" exists that the Board's traditional remedies of a cease and desist order and accompanying notice are able to "eras[e] the effects of past [unfair labor] practices so as to "ensur[e] a fair . . . re-run", the Board will

analyze the employer's ULPs "thoroughly to determine the seriousness, extent, and longevity of any inhibitive impact".

That is exactly what the Board did here, as we have proven by setting out at length the relevant portions of the Board's Decision. In turn, consistent with this mandate of *Jamaica Towing*, the Board reached the required conclusion that "Given the severity and long lasting effects of the violations, the possibility of erasing the effects of the Respondent's unfair labor practices and of ensuring a fair election by the use of traditional remedies is slight." [A. 1699]. This conclusion is fully supported by the following factors: (1) Novelis committed the very same three hallmark ULPs that *Jamaica Towing* found were those most likely to support a G*issel* II bargaining order, "[t]hreats of plant closure or losing employment, grant of benefits to employees, [and] . . . demotion . . . of union adherents", *supra* at 21-22; (2) each of these three ULPs is regarded by the Second Circuit to be : "serious" and having "a lasting inhibitive effect on a substantial percentage of the workforce", *supra* at 17; (3) the Board law is to the same effect; *supra* at 21-22; (4) all three of these serious hallmark ULPs were pervasive since the wage increase affected the entire bargaining unit, the threats of job loss were heard by at least half of the employees, and the fact of Abare's demotion was widely known among the employees, *supra* at 22, 24, 25; (5) the coercive impact of the threats of job loss, loss of business, reduced pay, and more onerous working conditions was

enhanced because they were made at the captive audience meetings by Novelis' highest ranking corporate and plant level officials, *supra* at 24, 26; (6) the importance of the unlawful restoration of the Sunday premium pay and the unscheduled overtime pay was magnified by the fact that their elimination was "the flashpoint" which caused the "employees [to] seek[ ] collective bargaining representation", [A. 1698]; (7) the coercive impact of this ULP was compounded when Martens and Smith at the captive audience meetings misrepresented the terms of a letter from Region 3 stating it was a Board charge filed by USW related to the restoration of the two forms overtime pay and falsely claimed that if Novelis lost before the Board it would have to rescind the newly restored benefit, *supra* at 22, 24, n.13; and (8) the fact that Abare's demotion occurred after the election is strong evidence that Novelis will persist in its unlawful conduct, *supra* at 26. On this record, without more, a conclusion that the Board did not abuse its discretion in finding that only a "slight possibility" existed that the traditional Board remedies could ensure a fair re-run is fully warranted.

However, there is more, since the Board amplified its conclusion on this point by analyzing Novelis' ULPs as a totality and recognizing that "the sum of Respondent's misconduct is far greater than its individual parts with respect to its impact on employees' ability to freely exercise their choice whether to select union representation." [A. 1700]. In essence, as described by the Board, "Respondent's

misconduct coalesced into a potent theme of contrasting its current personal commitment to the employees with the prospect of a 'third party' union that would lead only to dire economic consequences for them." *Id.* A key part of this theme was CEO Martens' "dramatic reference to his sparing of the Oswego facility from closure out of loyalty to its employees, while shutting down another facility and laying off its employees instead" at the captive audience meetings and Plant Manager Smith's "similar message" at those same meetings. *Id.* The other ULP "reinforcing the union-as-interfering-outsider theme" was the false claim, which "was communicated in part by holding up a misleadingly redacted letter from a Board investigator", that USW was trying to rescind the restored Sunday premium and unscheduled overtime pay. *Id.* These benefits, the Board emphasized, "were clearly of great importance to the employees", as evidenced by the facts that the initial announcement of their proposed elimination "was met by 50-60 employees walking off the job 'demanding answers'" and that the meeting at which their elimination was confirmed was followed up the next day by Abare contacting USW to start the organizing drive. *Id.* Given Novelis' "persistent painting of the Union as a threat to the employees' job security and economic well-being", the Board concluded that: ". . . merely requiring the Respondent to refrain from unlawful conduct in the future, to reinstate Abare to his former position with back

pay, to rescind unlawful rules, and to post a notice would not be sufficient to dispel the coercive atmosphere that this Respondent has created". *Id.*

When this analysis by the Board is combined with the realization that the unfair labor practices here are more serious than those in *International Metal Specialties*, 433 F.2d 870, that this Court held required the issuance of a Category II bargaining order pursuant to *Gissel* itself,[19] it is crystal clear that the Board, prior to the required consideration of post-election evidence, did not abuse its discretion when it found that traditional Board remedies were inadequate to insure more than a "slight possibility" of a "fair re-run election".

The soundness of this conclusion is confirmed by the Seventh Circuit's decision in *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, (7th Cir., 1994), cert. den. 513 U.S. 1080 (1995). Like this Court, the Seventh Circuit finds it an abuse "of the Board's discretion to impose a bargaining order without sufficient analysis and discussion of the adequacy of traditional remedies". *Id.* at 481. And in *Q-1*, it explained that it found that 'the Board discharged its burden" given that:

> "It considered the severity of the unfair labor practices; the high-level management officials who committed them; the timing of the threats of discharge and plant closure, as well as of the promises to increase pay and address grievances; the fact that, in its view, all of the employees were affected; and the small size of the bargaining unit. In light of these factors, the Board concluded that: "the possibility of erasing the effect of the

[19] See: *supra* 14-16, 20, n.12.

> Respondent's extensive and serious violations is slight and the holding of a fair election unlikely."
>
> . . .
>
> The Board's discussion is not a mere "summary conclusion", such as that disapproved of in *Montgomery Ward*[*v. NLRB*]. *See:* 904 F.2d at 1159. Instead, it is a delineation of factors, supported by the record, that we had repeatedly found sufficient to justify a bargaining order." *Id.* at 481 (citations omitted).

The exact same thing can be said for the Board's analysis here.

C) The Board Did Not Abuse Its Discretion When It Considered Novelis' Evidence As To Changed Circumstances Subsequent To The Election And Concluded That Such Evidence Did Not Negate The Necessity For A Category II Bargaining Order

In its brief, Novelis asserts that enforcement of the bargaining order should be denied because the Board allegedly failed to consider post-election evidence which it proffered as to employee turnover, passage of time, management turnover, lack of recurrence of additional unfair labor practices, and remedial efforts. See: Novelis Brief at 67-71.[20] This argument misstates the record.[21] The Board *did*

[20] The Employee Intervenors made similar arguments. See: Employee Intervenors' Brief at 22-27.

[21] Novelis concedes in its Statement of the Standard of Review that "the Court reviews the Board's evidentiary rulings for abuse of discretion." Novelis' Brief at 13 *(citation omitted)*. However, it never acknowledges the controlling Second Circuit understanding that an identical standard controls its review of the issuance of a bargaining order. *infra* at 8. Instead, Novelis wrongly suggests that bargaining orders are subject to an undetermined heightened standard of review. (See: Novelis Brief at 13).

consider this evidence and concluded that it did not defeat the necessity of a *Gissel* II bargaining order. We now explain why, as to each type of evidence, the Board did not abuse its discretion in so concluding.

1) Employee Turnover And Passage Of Time

It is clear Second Circuit law that the Board would have abused its discretion if it had refused to consider Novelis' evidence on employee turnover and passage of time. *See e.g.: NLRB v. Knogo Corp.*, 727 F.2d 55 at 60; *NLRB v. Windsor Industries,* 730 F.2d 860, 864. Rather, these two factors "must be examined" since the Board in Category II cases must "make the determination whether or not the employer's practices have had 'the tendency to undermine majority strength and impede the election process', *Gissel*, 395 U.S. at 614." *Windsor Industries*, 730 F.2d at 867. As such, the Second Circuit test is not a mere mechanical one whereby a particular percentage of turnover or the passage of given number of years and months automatically triggers a conclusion that a *Gissel* II order is no longer necessary. Rather, the test requires that the Board examine the nature of the employer's ULPs to determine if they still exert a coercive effect.

That is exactly what the Board did here, when, after it denied on the basis of settled Board law Novelis' three post-hearing motions filed on July 5, 2015, January 27, 2016, and August 16, 2016 to re-open the record to receive post-

hearing evidence as to as to employee turnover and passage of time,[22] it nevertheless proceeded to consider the proffered evidence and concluded that it did not defeat the necessity of a bargaining order because its ULPs continued to impact the employees. Its reasoning is set forth in full below:

> "Even if we were to consider the Respondent's evidence, it would not require a different result. While some of employees who were employed at the time of the unlawful conduct may no longer work for the Respondent, a substantial number of unit employees who *would* recall the Respondent's serious and widespread unlawful labor practices remain in the Respondent's employ. Those employees are likely to have informed any new employees of what transpired during the Union's organizing campaign. See *State Materials,* 328 NLRB at 1317-1318. As the United States Court of Appeals for the Fifth Circuit stated, "Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (1978) …
>
> . . .

[22] The Board cited in support of this action, *Garvey Marine, Inc.*, 328 NLRB 991 at 995 (1999), enf'd 245 F.3d 819 (D.C. Cir. 2001); *Be-Lo Stores*, 318 NLRB 1 at 15 (1995), enf'd in part, rev'd in part 126 F.3d 268 (4th Cir., 1997), and *State Materials, Inc.*, 328 NLRB 1317 at 1317-1318 (1999). The majority of Circuits, like this Court, have rejected this position on the part of the Board and require the NLRB to consider, but not deem conclusive, evidence as to events occurring after the election. However, the Ninth Circuit, except in cases where the entire bargaining unit has completely turned over on its own volition, has adopted the Board's view that the propriety of a bargaining order is to be determined as of the date of the election. *See: New Life Bakery v. NLRB*, 980 F.2d 738 (9th Cir., 1992); NLRB *v. Bakers of Paris, Inc.*, 929 F.2d 1427 (9th Cir., 1991); *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir., 1979).

> As for the passage of time, almost two and one-half years have elapsed since the election, and approximately one and one-half years since the date of the judge's decision. Given the number of employees exposed to the Respondent's unlawful conduct and the nature and severity of the conduct, we do not consider the passage of time since the Respondent's violations to be unacceptable for *Gissel* purposes." [A. 1700, n. 17, emphasis in original.]

Given this consideration by the Board of Novelis' "subsequent events" evidence, the key contention of Novelis' brief, that "the Board's failure *to even consider* evidence of changed circumstances is fatal to its order" makes no sense. (See: Novelis Brief at 70, emphasis added, citation omitted). And Novelis, citing turnover percentages, wrongly reads *J.L.M. v. NLRB*, 31 F.3d 79 at 84 (2d Cir., 1994), "(41% turnover rate persuasive)", *NLRB v. Marion Rohr Corp,,* 714 F.2d 228 at 231 (2d Cir., 1983), "(33% persuasive)", and *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 at 273 (2d Cir., 1981), "(34% persuasive)", as setting forth hard and fast employee turnover thresholds which automatically preclude entry of a *Gissel II* order. (See: Novelis Brief at 69-70).

In all three of these cases, unlike here, the Board had refused to consider turnover and, also unlike here, failed to explain why turnover was not relevant because the coercive impact of the respondent's ULPs would continue to impact its new hires. As such, they do not stand for the proposition for which they are cited by Novelis. And the best proof of this point is contained in the Second Circuit's continuing admonition that in assessing the importance of employee turnover in a

particular case, "we must guard against rewarding an employer for his own misconduct or delaying tactics." *Jamaica Towing*, 632 F.2d at 214, quoted in *Windsor Industries*, 730 F.2d at 867, and *Knogo Corp.*, 727 F.2d at 60. In so stating, this Court acknowledged that by identifying turnover as a factor to be considered in a *Gissel* analysis, it had opened the door to possible wrong results because employers could now claim that the inevitable turnover accompanying employers' "delaying tactics" justified denying enforcement of an appropriate *Gissel* II order.

A similar concern on this Court's part was so strong in the related context of the enforcement of a bargaining order in a unit where the union had won an election nine years before by a vote of 15-14, that it refused to consider 500% turnover in the bargaining unit during the ensuing nine years. *See*: *NLRB v. W.A.D. Rentals, Ltd.*, 919 F.2d 839 at 841-842 (2d Cir., 1990). It did so on the separate and independent grounds that not only did the doctrine of the presumption of continuing majority support preclude consideration of employee turnover as a matter of law[23], but also that including turnover as a relevant factor offended labor policy because it not only gave the employer the incentive to engage in delaying litigation but encouraged the commission of ULPs:

[23] This doctrine is limited to certified unions that have won a Board election.

> "[T]he policy behind the presumption of continuing majority support not only allows time for the bargaining process to work, see *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 705 (1944), but in addition, insisting on continued majority support, in an industry – such as the private car rental service – where there is a high employee turnover rate, would encourage an employer to commit unfair labor practices. An employer not anxious, for example, to have its employees organized would quickly realize that employee turnover would work in its favor, so that after the passage of time the only remedy available upon complaint of an unfair labor practice would be a cease and desist order and a new election. By playing a waiting game, the employer could indefinitely postpone serious bargaining with the union. *See Chromalloy Mining & Minerals Alaska Div., Chromalloy American Corp. v. N.L.R.B.*, 620 F.2d 1120, 1132 (5th Cir. 1980).
>
> . . .
>
> To allow an employer first to stall and then to engage in lengthy litigation and later to claim that in the meantime its high employee turnover rate has effectively left none of the employees on its payroll who originally voted for the union, would give employers an incentive to use such tactics. Providing such an incentive would serve only to encourage the commission of unfair labor practices. *See: Glomac Plastics, Inc. v. N.L.R.B.*, 592 F.2d 94, 101-02 (2d Cir. 1979); *N.L.R.B. v. All Brand Printing Corp.*, 594 F.2d 931 (2d Cir. 1979)." *Id.*at 842.

This Court based its alternative policy holding squarely on *Chromalloy*, a Fifth Circuit *Gissel* II case which upheld a bargaining order on a showing of threats to close the plant, the offer to a single employee of a job training opportunity, and the discriminatory refusal to recall the leading union adherent. *See: Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120 at 1132 (5th Cir., 1980). Refusing to consider turnover because there was adequate evidence for the

Board to find that a fair election could not be held at the plant regardless of employee turnover since the time of the hearing, the Fifth Circuit emphasized the very same labor policy concerns[24] that the Second Circuit would later point to in *W.A.D. Rentals* citing *Chromalloy*. *W.A.D. Rentals*, 919 F.2d at 842.

Crucially, both *Chromalloy* and *W.A.D. Rentals* are consistent with *Gissel* itself. There, the Supreme Court explained that the reason it was compelled to create the concept of the *Gissel* bargaining order in the first instance was because "If the Board could enter only a cease and desist order and direct an election or re-run it would in effect be rewarding the employer and allowing him to profit from [his] own wrongful refusal to bargain." 395 U.S. at 611 (citation omitted). It then made clear that an employer's delay did more than "just put off his bargaining obligation" since "He can also affect the outcome of a re-run election by delaying tactics, for figures show that the longer the time between a tainted election and a re-run, the less are the union's chances of reversing the outcome of the first election". *Id.* at 611, n.30.

Thus, for two reasons, an employer resisting a *Gissel* Category II order has an even greater incentive "to stall and then . . . engage in lengthy litigation" than the employer in *W.A.D. Rentals* . First, delay allows it to magnify its chances of winning a re-run, and, second, because no presumption of continued majority

[24] See: 620 F.2d at 1132-1133.

support applies in a *Gissel* II context, turnover is now a relevant factor that can lead a Court of Appeals to deny enforcement. Given this realization, the obvious strategy is to commit the ULPs necessary to win the election and then litigate each to the bitter end, all the while knowing, given the inherent delays in the Board's administrative process, that the employer's case will get stronger by the month as both the passage of time and the growing turnover in the unit hopefully combine to defeat the bargaining order, which is the only NLRB remedy an employer fears.

This case is a textbook example of how this tactic works in practice. Here, much like the rapid turnover private car service in *W.A.D. Rentals*, Novelis knew that the bargaining unit would be growing and that every month turnover would be inexorably greater, and so it had every incentive for delay. Consequently, after being found by the ALJ to have committed each and every ULP alleged by the General Counsel, it filed exceptions to every single violation, and ended up losing all sixteen ULPs before the Board. [A. 1698-1701, A. 1728 -1742]. However, as the litigation dragged on, Novelis had the opportunity to file three separate motions to reopen the record on June 5, 2015, January 27, 2016, and August 16, 2016, only ten days before the Board issued its Decision & Order on August 26. [A. 1639-1653, A. 1663-1682, A. 1683-1694]. And Novelis was thoroughly aware of how the inevitable passage of time worked in its favor, as exemplified by this passage from Pages 3-4 of its July 2, 2015, Reply Brief In Support of Its Motion To

Reopen The Record For Limited Purpose Of Presenting Evidence of Changed Circumstances:

> "The changes to the composition of the bargaining unit as defined in the parties' stipulated election agreement, including the 156 new employees hired since the election *(and which will continue to grow)*, is not trivial and *is an important factor in evaluating the propriety of a bargaining order*…Likewise, the passage of time of 16 months since the election, while not as long as the extreme cases cited by the Board, *nonetheless is significant and growing each day. This factor should also be considered.*" (emphasis added, footnote omitted). [A. 1753-1754]

Each of the three motions to reopen the record was accompanied by a supporting declaration attached as Exhibit 1 from Oswego Plant Human Resources Director Malcolm Gabriel.[25][A. 1651-1653, A. 1675-1678, A. 1687-1690]. Without citing a source, but presumably referencing the Gabriel declaration accompanying the August 16, 2016, motion [A. 1687-1690], Novelis asserts in its brief "that by August, 2016, 84 of 599 eligible voters were no longer employed in the bargaining unit and that the bargaining unit had added approximately 42.5%

[25] The June 5, 2015 motion was entitled Respondent Novelis Corporation's Motion To Reopen The Record For Limited Purpose of Presenting Evidence Of Changed Circumstances. [A.1639-1653]. The January 27, 2016, motion was entitled Respondent Novelis Corporation's Motion Supplementing Its Request To Reopen The Record For Limited Purpose of Presenting Evidence of Changed Circumstances [A. 1663-1682], and the August 16, 2016 motion was entitled Respondent Novelis Corporation's Motion Further Supplementing Its Request To Reopen The Record For Limited Purpose Of Presenting Evidence of Changed Circumstances. [A. 1683 -1694].

new employees with 255 hires" and that, as a result, the turnover at the plant fell within the 34-45% range deemed "persuasive" by the Second Circuit in *JLM, Marion Rohr*, and *Chester Valley*. *See:* Novelis Brief at 69-70.

This argument is incorrect as a matter of both arithmetic and logic. First the arithmetic: measuring turnover in a bargaining unit as of a given date involves calculating the percentage of total bargaining unit members consisting of those who were eligible to vote on the date of the election and those hired since the election. We have no idea how Novelis reached the 42.5% figure. However, if we wrongly assume that as of August 10, 2016, as Gabriel implies in his declaration, the bargaining unit consisted of 770 persons, 515 of whom had been eligible to vote in the election and 255 of whom had been hired after the election, then turnover equals 33.12% since the former represented 66.88% of the 770 person bargaining unit and the latter 33.12%. However, as a matter of logic, it is impossible to calculate the percentage of turnover as of August 10, 2016. This is because while each of the Gabriel declarations state precisely the number of the original 599 eligible voters remaining employed in bargaining unit jobs on the date stated in the declaration, each declaration states only the total number of persons hired into bargaining unit jobs since the date of the election in February, 2014, and does not state how many of those new hires *remain* employed in the bargaining

unit as of the date of the declaration.[26] As such, the declaration completely ignores attrition among the new hires. Consequently, it is impossible to calculate turnover because the actual size of the bargaining unit cannot be determined.

In the end, all we can say with certainty about turnover at the Oswego plant is exactly what the Board said: "a substantial number of unit employees who *would* recall the Respondent's remarks and widespread unlawful labor practices remain in the Respondent's employ." [A. 1700, n.17, emphasis in original]. Indeed, it is impossible to quarrel with this description since this is what we know for certain from the Gabriel Declaration: **that on August 10, 2016, six days before the D&O issued, fully 86% of the employees eligible to vote in the February 2014 election remained in the bargaining unit (515 of 599), and that they outnumbered the new hires (which at most total 255) by a ratio of at least two to one.** Given the seriousness of the ULPs here and their long-lasting impact, the passage of 2 ½ years between the election and the Board's Order will not suffice to defeat the entry of the *Gissel* II Order at issue. This is because, as recognized in *Jamaica Towing*, 632 F.2d at 214, the concern for protecting employee choice is strongest when "the employer's conduct preventing a fair election is marginal in

[26] See June 15, 2015 Declaration, ¶¶ 6, 10 [A. 1652-1653]; January 22, 2016 Declaration, ¶¶ 11, 12 [A. 1677]; August 10, 2016 Declaration, ¶¶ 9, 10.[A. 1689].

any view". By the same token, where the employer's ULPs are highly coercive and long lasting, turnover and passage of time are less important.

This insight in *Jamaica Towing* is precisely the point of *Bandag, Inc. v. NLRB*, 583 F.2d 765 (5th Cir., 1978), the case on which the Board squarely relied here in concluding that "Even if we were to consider the Respondent's [turnover] evidence it would not require a different result"[27]. It did so because the highly coercive and long-lasting nature of the ULPs on which the bargaining order here rests fall within the understanding of *Bandag* that "Practices may live on in the lore of the shop and continue to repress employees' sentiment long after most, and even all, original participants have departed." *Id.* at 772.

In *Bandag*, the main issue related to the bargaining order was the employer's contention that "the Board failed to accept evidence of employees' turnover in the period between the hearings and findings of the ALJ and that of its own review." 578 F.2d at 772. Acknowledging the special expertise of the Board "to evaluate the seriousness of the unfair labor practices and their impact on the plant," the Fifth Circuit gave as the prime example of such expertise the Board's ability to determine whether certain ULPs "live on in the lore of the shop"[28] *Id.* It then held,

[27] [A. 1700, n. 17].

[28] 583 F.2d at 772.

consistent with the understanding of *Jamaica Towing*, that turnover was a consideration only if the impact of the ULPs had dissipated, holding:

> "The Board is not compelled to infer that past practices have attenuated, especially practices striking directly at the heart of the security of the employees, such as threats to close the plant, blacklisting, and the like. Employee turnover between unfair labor practices and bargaining order is a relevant consideration for the Board in such a case. *See: NLRB v. Gibson Products Co.*, 494 F.2d 762 (CA5, 1974); *J.P. Stevens & Co. v. NLRB, supra.* In this case, however, the Board could find that regardless of turnover the taint of the practices would continue. We cannot say, therefore, that the Board erred in adopting the ALJ's findings and conclusions without reopening the record." *Id.*

The same is true here, where the Board applied its expertise to determine that the coercive impact of Novelis' ULPs continued to linger.[29]

2) Management Turnover And Lack Of Recurrence Of Unfair Labor Practices

In its brief, Novelis complains that the Board refused to consider its proffered evidence that CEO Martens left Novelis in April 2015 and Plant Manager Smith departed a year later on April 16 and that their departure eliminates the need for a bargaining order since they were the persons alleged to have committed the most serious ULPs supporting the bargaining order. See: Novelis Brief at 68. As was the case with employee turnover and passage of time, the

[29] Explicitly relying on *Bandag*, the D.C. Circuit reached an identical conclusion in *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819 at 828, 829 (D.C. Cir., 2001). Accord: *Piggly Wiggly Tuscaloosa Division v. NLRB*, 705 F.2d 1537 at 1543 (11th Cir., 1983).

Board did in fact consider the proffered evidence as to management turnover and concluded "it would not require a different result" since "the Respondent's ownership remains the same and some of the management personnel who engaged in the unfair labor practice remain employed by the Respondent". [A. 1700, n. 17]. The Board explains in its brief why the Board did not abuse its discretion in so concluding, and we adopt its argument in its entirety.

In addition, a fundamental error in Novelis' argument is that it assumes that the Board has the burden of proving as part of its case in chief the likely recurrence of additional unfair labor practices on the part of Novelis, thus making management turnover relevant. This assumption is wrong, as made clear by both *Gissel* and this Court's decision in *NLRB v. Scoler's, Inc.* 466 F.2d 1289 (2d Cir., 1972), which hold that the decision to prove the likely recurrence of ULPs is a discretionary one for the Board in the circumstances presented by this case.

We begin with *Gissel*. There, the Supreme Court explained that the paradigm circumstance requiring a Category II bargaining order is one where the employer's ULPs prior to the first election make both questions of recurrence of ULPs in the future and the Board's traditional remedies irrelevant:

> "If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election he may see no need to violate a case-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the

> employer's unlawful campaign." 395 U.S. at 612. (footnote omitted)

Given this recognition, the Supreme Court emphasized that in this circumstance the decision whether to consider the issue of recurrence is one consigned to the discretion of the Board, stating "in fashioning a remedy *in the exercise of its discretion*, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practice in terms of their past effect on election conditions and the *likelihood of their recurrence in the future.* 395 U.S. at 614 (emphasis added).

Relying on this language from *Gissel*,in *Scoler's Inc.*, a Category II *Gissel* case, this Court enforced a bargaining order notwithstanding the Board's *refusal* to consider the issue of likely recurrence of ULPs by the employer:[30]

> "The Board may therefore be said to have examined, as *Gissel* suggests, the full range of respondent' unfair conduct and its past effect; *it has not made any prediction of the likely recurrence of such conduct, but Gissel merely suggests, and does not require consideration of that factor*. Indeed the Court noted, in discounting the value of a cease-and-desist order in all circumstances that a 'bargaining order, is designed as much to remedy past election damage as it is to deter future misconduct.' *Gissel*, 395 U.S. at 612, 89 S.Ct. at 1939. In certain cases, as here, *the damage already done may be so severe that the*

[30] In *Scoler's*, the ULPs deemed sufficient to warrant the bargaining order included a threat to close part of the restaurant , two threats to discharge union supporters, and promises of wage increases. 466 F.2d at 1291-1292.

> *probability that employer misconduct will not recur is irrelevant.*"[31] 466 F.2d at 1293, emphasis added.

This same conclusion applies here, where the repeated threats of job loss by Martens and Smith, combined with the destruction of the very raison d'etre for union representation by the unlawful restoration of the Sunday premium and unscheduled overtime pay on the very same day the petition was filed, rendered the Board's traditional remedies irrelevant.[32]

D) The Board Did Not Abuse Its Discretion When It Considered Novelis' Evidence Concerning Claimed Remediation Of Its Unfair Labor Practices And Concluded That Such Evidence Did Not Negate The Necessity For A Category II Bargaining Order

The Board explains in its brief why Novelis' letters to its employees did not remediate Novelis' many ULPs, and we have nothing to add to its arguments on the point. Instead, we explain why the §10(j) injunction failed, as a matter of law, to remedy Novelis' ULPs.

In its decision on the §10(j) petition filed by NLRB Regional Director Rhonda Ley, the District Court found "reasonable cause to believe" that Novelis

---

[31] As it is entitled to do under the discretion granted by *Gissel*, the Board bolstered its conclusion as to the necessity of a Category II bargaining order by relying in part on the likelihood of recurrence of ULPs established by the unlawful demotion of Everett Abare.

[32] By contrast, none of the Second Circuit cases relied on by Novelis involved a comparable showing of employer violations prior to the election resulting in only a "slight possibility" of a fair re-run election if traditional remedies were employed.

committed each and every §§ 8(a)(1) and 8(a)(3) violation later found by the Board in its Decision and Order. (Compare: *Ley v. Novelis Corporation*, 2014 WL 4384980 at *7 (N.D.N.Y., 2014) to A. 1701). In addition, the District Court found that injunctive relief was "just and proper" as to each of these ULPs and entered an order requiring the "restoration of Abare to his prior position . . . , and restraining and enjoining Novelis from engaging in any ULPs during the pendency of the administrative process", the posting of a copy of the court's order, and the reading of the order by Martens or Smith to bargaining unit members at meetings held on paid working time at the plant. *Id.* at *7. However, the District Court denied that part of the petition seeking an interim bargaining order on the grounds that "while there is reasonable cause to believe that ULPs were committed the evidence of ULPs is not overwhelming, or, at least, it is subject to a wide range of interpretation", and "the employees in the unit themselves – as evinced by the copious declarations and confidential witness affidavits filed herein . . . are obviously sharply divided over the issue of unionization." *Id.* at * 6.

Both Novelis and the Employee Intervenors argue that the facts that Smith read the Court's order to the entire bargaining unit and that Novelis did not violate the terms of the §10(j) injunction during its pendency is convincing proof that it remedied its ULPs and that a bargaining order is not needed because traditional remedies will suffice. See: Novelis Brief at 14, 88-89; Employee Intervenors' Brief

at 22-23. It is nothing of the sort for two reasons. First, the fact that Novelis, which has committed sixteen ULPs, was not willing to incur a contempt sanction while it was subject to the jurisdiction of a District Court is not predictive of how it will conduct its affairs once judicial scrutiny is lifted. Second, the §10 (j) injunction offered only interim relief and expired on August 16, 2016, the date the D&O issued. On its part, Novelis, notwithstanding the departure of Martens and Smith, has sent a powerful and chilling message to the bargaining unit of its vulnerability to future ULPs by its *continuing* determination to demote leading union adherent Abare and deny him backpay by seeking in this Court to overturn that portion of the D&O reinstating him to his position with a make-whole remedy.

Because the Board did not appeal the District Court's Order, we will never know if it erred when it denied the Regional Director's request for a bargaining order. [33] However, by dint of this Court's seminal decision of *Seeler v. Trading Port Inc.*, 517 F.2d 33 at 37-38 (2d Cir., 1975), we know that when a §10(j) order enjoins serious and pervasive ULPs but omits a petitioned for bargaining order, it is not possible for the injunction to adequately remedy those ULPs so as to create more than a "slight possibility" of a fair re-run election. *Trading Port* based this

[33] The District Court's denial of the bargaining order request is irrelevant to this case because "findings made on a motion for temporary injunction under section 10(j) are not determinative of the merits in a subsequent unfair labor practice proceeding". *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 95 at 97 (2d Cir., 1988), cert. den. 490 U.S. 1108 (1989), Accord: *Q-1 Motor Express, Inc.*, 25 F.3d at 477.

conclusion on the very same quote from *Gissel* set out on pages 44-45 of the preceding section of this brief, and it explained at length why the failure to issue a bargaining order in the circumstances here would visit irreparable harm on the union by crippling its chances of winning a re-run:

> "Just as a cease and desist order without more is ineffective as final relief in a *Gissel* situation, it is, in certain cases, also insufficient as interim relief. If an employer faced with a union demand for recognition based on a card majority may engage in an extensive campaign of serious and pervasive unfair labor practices, resulting in the union's losing an election, and is then merely enjoined from repeating those already successful violations until final Board action is taken, the Board's adjudicatory machinery may well be rendered totally ineffective. *A final Board decision ordering a new election will leave the union disadvantaged by the same unfair labor practices which caused it to lose the first election. Even if the Board finally orders bargaining, probably close to two years after the union first demanded recognition, the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible.* 517 F.2d at 37-38. (emphasis added, footnote omitted).

In sum, given Novelis' serious and pervasive ULPs, the truncated §10(j) injunction ordered by the District Court, far from proving the adequacy of traditional Board remedies, is an additional factor supporting the enforcement of the *Gissel* II bargaining order at issue here.

E) The Board Did Not Abuse Its Discretion When It Refused To Admit Evidence From Employees Seeking To Testify As To Their Personal Reactions To Novelis' Unfair Labor Practices And Personal Opinions As To Why USW Lost The Election

Novelis makes much in its brief of the ALJ's rejection of proffers that individual employees would have testified that they believed that: (1) USW lost the election because they shared their negative experiences with other unions with their fellow employees or because they disapproved of the campaign run by USW or the conduct of their fellow employees who supported USW; (2) Novelis "ran a fair and even handed campaign, did not make any threats, and did not affect the way they voted"; (3) they "could vote their true feelings in a second election", and (4) "it would be unfair to saddle them with a Union they did not want." See: Novelis Brief at 61-62. The ALJ's exclusion of this evidence was consistent with his reasoning on the second day of the hearing, when he granted the General Counsel's motion in limine to exclude employees' testimony as to the subjective, personal impact on them of Novelis' actions or as to their belief as to why USW had lost the election. [A. 0072; Tr. 103, L.8-104, L. 13). He did so in reliance on *Lee Lumber & Building Material Corp.*, 322 NLRB 175 at 177, n.23 (1996), enf'd in part and remanded 117 F.3d 1454 (D.C. Cir., 1997), in which the Board, citing *Gissel* as an example, stated:

> "The Board's usual approach where a question arises concerning the effects of employers' unfair labor practices on employees is to apply an objective, rather than a subjective, test (i.e., to assess

> the *tendency* of the unlawful action to affect employees, rather than its *actual* effect on them). See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (approving Board's use of bargaining order when an employer's unfair labor practices tend to undermine majority strength and impair the election process." (emphasis in original).

Applying the correct abuse of discretion standard to those evidentiary rulings that were the subject of exceptions, the Board concluded "after a careful review of the record, we find no abuse of discretion in any of the challenged rulings." [A. 1695, n. 3]. On its part, Novelis cites no case supporting its claim that the Board was obligated to abandon the objective test required by *Gissel* and accept the subjective evidence it proffered. Instead, it cites inapposite Circuit Court cases that actually refute its argument because they apply an objective standard to determine whether the Board's application of its objective test to the facts of the case warranted a bargaining order under the objective criteria of *Gissel*. See: *Kinney Drugs*, 419 F.3d at 1431-1432; *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57 at 70-71 (1st Cir., 1981); and *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883 at 888-889 (6th Cir., 1990).

Novelis' inability to cite to a relevant case is not surprising because its argument stands the law on its head. However, on our part, we can point to an on-point Court of Appeals decision decided only two years after *Gissel* rejecting the identical arguments made here, that of the Fifth Circuit in *J.P. Stevens Co. v. NLRB*, 441 F.2d 514 (5th Cir. 1971). There, the union, after receiving a majority

of authorization cards, lost the election by a vote of 198-110. *Id.* at 517. At the NLRB hearing, 117 employees "intervened in the proceedings on behalf of the Company." *Id.* at 518. Ultimately, the Board upheld the ALJ's recommendation and entered a *Gissel* bargaining order. *Id.* The employees also intervened in the Court of Appeals on the side of the company. *Id.* Included among the intervenors were "many … employees who … were active union adherents during the organizational drive" and who recanted their support of the union during the hearing. *Id.* at 515. The Circuit found that "We think that the Board could find in its expert judgment that the subsequent recantation was simply a product of Stevens' unlawful conduct." *Id.* It then took up the exact same argument made by Novelis here, which it rejected as counter to the objective test required by *Gissel* in assessing the impact of ULPs on employees:

> "Still it might be argued that many of the recantations were not the product of Stevens' unlawful conduct. There may be employees who, uncoerced by the Company's unfair labor practices, now reject the Union. Employee free choice for them would best be served by an election. But the Board's evaluation of the propriety of a bargaining order cannot be based on employee motivations, determined individual by individual. *We cannot require the Board to engage in the hopeless and impossible task of evaluating the subjective reasons for each employee recantation. The Board must, on the objective facts, determine the seriousness of the employer unfair labor practices and consider the possibility of a fair retun election.* Note, NLRB v. Gissel Packing Co: Bargaining Orders and Employee Free Choice, 45 N.Y.U.L.Rev. 318 (1970). Once the Board has done so, if supported by substantial evidence, its bargaining order must be enforced." *Id.* at 527, emphasis added.

VII. CONCLUSION

For the foregoing reasons, Novelis' Petition for Review should be denied, and the Board's Application for Enforcement should be granted.

Respectfully submitted,

Dated: May 12, 2017

s/ Richard J. Brean

Richard J. Brean
Daniel M. Kovalik
Anthony P. Resnick
United Steelworkers Legal Department
60 Boulevard of the Allies, Room 807
Pittsburgh, PA 15222-1214
Telephone: 412-562-2530
Facsimile: 412-562-2574
rbrean@usw.org
dkovalik@usw.org
aresnick@usw.org

Brian J. LaClair
Kenneth L. Wagner
Blitman & King, LLP
Franklin Center, Suite 300
443 North Franklin Street
Syracuse NY 13201
Telephone:315-671-3262
Facsimile: 315-471-2623
bjlaclair@bklawyers.com
klwagner@bklawyers.com

Counsel for Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) and the Court's order (Dkt. 88) because this brief contains 13,708 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2010 in proportionally spaced, 14-point Times New Roman.

May 12, 2017

s/Richard J. Brean
Richard J. Brean

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2017, I electronically filed the foregoing Brief For Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC with the Second Circuit Court of Appeals NextGen CM/ECF filing system and mailed six paper copies to the Clerk of the Second Circuit by First Class Mail, postage prepaid.

I FURTHER CERTIFY that on May 12, 2017 participants in the case who are registered CM/ECF users were served by the appellate CM/ECF system, and that two paper copies of the aforementioned Brief were served on the following counsel by First Class Mail, postage prepaid:

Kurtis A. Powell, Esq.
Robert T. Dumbacher, Esq.
Hunton & Williams LLP
600 Peachtree Street, NE, Suite 4100
Atlanta, GA 30308
(Counsel for Petitioner/Cross-Respondent Novelis Corporation)

Kenneth L. Dobkin, Esq.
Assistant General Counsel
Novelis Corporation
3560 Lenox Road, Suite 2000
2 Alliance Center
Atlanta, GA 30326
(Counsel for Petitioner/Cross-Respondent Novelis Corporation)

Thomas G. Eron, Esq.
Bond, Schoeneck & King, PLLC
1 Lincoln Center
Syracuse, NY 13202
(Counsel for Intervenors, John Tesoriero, Michael Malone, Richard Farrands & Andrew Duschen)

Linda Dreeben, Esq.
Usha Dheenan, Esq.
Kellie Isbell, Esq.
National Labor Relations Board
1015 Half Street,
S.E. Suite 4163, Room 4135
Washington, DC 20570
(Counsel for Respondent - Cross Petitioner National Labor Relations Board)

Maurice Baskin, Esq.
Littler Mendelson, P.C.
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006
(Counsel for Amici Curiae United States Chamber of Commerce and Coalition for a Democratic Workplace

s/ Richard *J. Brean*
Richard J. Brean